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No. 84-626

UNITED STATES SUPREME COURT

OCTOBER TERM 1984

WILLIAM MCGAFFIN, Petitioner

vs.

CATHY ROBERTS

ON WRIT OF CERTIORARI
FROM THE SUPREME COURT OF THE
STATE OF CONNECTICUT

BRIEF FOR RESPONDENT

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Record For
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The appendix referred to in this brief is that filed with the petition by the petitioner.

SUMMARY OF ARGUMENT

The respondent relies on five principals of law to show that the writ of certiorari should not be granted.

1. The first argument is that Rule 21g provides that the petition for the writ must show when in the proceedings the question of any violation of a federal rights was first raised, so as to show that the federal question was timely and properly raised as to give the court jurisdiction. The petition only mentions that appeal was taken to the Supreme Court of Connecticut on constitutional grounds. For this reason the writ should be denied.

2. The facts presented by the respondent are the correct facts.

There are some differences as to what language of the memorandum of the lower court meant. The brief sets out these differences and what the respondent thinks are the correct facts.

3. Respondent contends that this court has not set any standards as to what proof is necessary in this case. Some cases cited by the petitioner are claimed to have set such standards, but these cases are not in point.

4. Respondent contends that this court should not set any standards. There are thousands of state and federal cases which give guidelines for the determination of such cases. This is a mater which needs no further interference from the federal courts.

5. Even if this court does set standards the standards could not be stricter than those set in Santosky vs. Kramer, 455 US 745, 102 S Ct 1388, 71 L Ed 2d 599, a case between the state and a parent where the state was attempting to force a surrender of all parental rights, and not just custody. But even if the same standards were applied here the result of the case would not be changed because the proof here was strong, clear, concise and convincing, so the result of the case would be the same.

LIST OF AUTHORITIES

24 American Jurisprudence 2d 968
Armstrong vs. Manzo 380 US 545, 85 S Ct 1187, 14 L Ed 2d 62

Spaulding vs. Palmer 81 Wash. 2d 604 503 P 2d 464 (1977)

Stanley vs. Illinois 405 US 645, 92 S Ct 1208 31 L Ed 2d 551 (1972)

24 American Jurisprudence 2d 968 (1982)

Armstrong vs. Manzo 380 US 545, 85 S Ct 1187, 14 L Ed 2d 62 (1965)

Hutchinson vs. Hutchinson 649 P 2d 38 (Utah 1982)

Lane vs. Lane 446 A 2d 418 (Me 1982)

Popp vs. Lucas 182 Conn. 545 438 A 2d 755 (1980)

Santosky vs. Kramer 455 US 745, 102 S Ct 1388, 71 L Ed 2d 599 (1982)

Smith vs. Organization of Foster Families 431 US 816, 97 S Ct 2094 53 L Ed 2d 14 (1977)

STATEMENT OF THE CASE

Cathy Roberts, the defendant in the State Court action is referred to in this brief as the respondent.

Where no record of evidence in the divorce hearing has been furnished, the facts can only be determined by the decision of the lower court which is set out in the appendix.

Respondent sets out the facts as slightly different from those set out by the petitioner in his brief. These differences while small are important. In the first part of the argument petitioner gives the reasons why her statement of facts are correct.

Petitioner brought this action by a writ of habeas corpus in the Superior Court of Middlesex County, Connecticut. After a hearing that court awarded custody to the respondent with visitation rights to the petitioner. Appeal was to Supreme Court of Connecticut which affirmed.

Petitioner married Lena McGaffin, daughter of the respondent, prior to January 7, 1978 when Cathy McGaffin the child in question was born to them. In 1978 they came to Connecticut and moved in to the home of the respondent where the petitioner, respondent, Lena and the child all lived until 1980 when the petitioner and Lena separated. Lena and the child continued to live with the respondent until 1981, when Lena moved a short distance away. However, the child stayed with the

respondent a substantial portion of each week during this period. In 1981 Lena obtained a Connecticut divorce from the petitioner. Custody of the child was not contested, and was awarded to Lena, and the petitioner was ordered to pay $25 a week child support to Lena.

On December 9, 1982 Lena died. The child has remained with the respondent ever since. The petitioner has visited the child on a fairly regular basis. The petitioner admitted that he was delinquent in making support payments.

On at least two occasions the child visited the petitioner and when returned to the respondent was so ill that she had to be hospitalized, once for a week and once for two weeks. On one of these occasions petitioner stated that the child had a tem-

perature when he picked her up. The following day she vomited, and petitioner took her to his wife's doctor, whose name he did not know, and who refused to treat the child, but did tell the petitioner that the child needed medical attention. Petitioner then took the child to his home, gave her aspirin. The following day he took the child to a beach. The child then vomited again, and had a high temperature. Petitioner then took the child back to the mother. The child was then hospitalized for two weeks. On the other occasion the child had a high temperature. Petitioner did nothing about it, but returned the child to her mother. The child was hospitalized immediately thereafter for one week. On both occasions the petitioner's wife stated that there was nothing wrong

with the child, and that the child was returned early because she had other plans.

Bruise marks were observed on the child's arms by a police officer and a worker for the State Department of Children and Youth Services, and by the respondent on April 18, 1982 after the child was returned from a visit with the petitioner. The child told the worker that her father had made the marks. The petitioner stated that the marks were made when the child had started to fall off of a bus and that he had grabbed her to keep her from falling. He stated that it took place between 5:00 and 5:30 in the afternoon and that the child was wearing a camel coat. His wife testified that these events took place in the morning, and that the

child was wearing a green windbreaker and not a camel coat.

Petitioner testified that the child would be nervous at the beginning of a visit, but eventually would become at ease. His wife testified that she was not nervous.

There was testimony from the respondent and others that, prior to visitations with the petitioner, the child would be fretful and upset. The child without question liked the grandmother and did not like the petitioner nor his wife. She stated that the petitioner hurt her and that his wife slapped her. One witness stated that the wife did not want to take care of children including Cathy.

The trial court made a finding of fact as follows:

"The court must weigh this against the wishes of her father who comes across as a parent asserting his rights but as having failed to demonstrate that he could be a responsible, reliable caretaker."

JURISDICTION

The respondent agrees with the petitioner that if there is a federal constitutional question involved, that the court has jurisdiction under 28 U.S.C. Par. 2(d). Respondent denies that there is a federal constitutional problem. Rule 22 cited by petitioner as a basis for jurisdiction, has nothing to do with jurisdiction of this court; however, Rule 17, 19, 20 and 21 set out terms of jurisdiction.

Under any circumstances this court does not have jurisdiction

because the information required by Rule 21g has not been furnished.

QUESTION PRESENTED

Respondent denies that there is or should be a constitutional standard to be applied in custody disputes between a non-custodial father and a materal grandmother after the death of the child's mother. This is a faucet of law reserved to the states under the tenth amendment.

If however, the court decides that such a standard be set, the facts of this case show by clear and convincing evidence that the state court properly awarded custody to the grandmother, and if the court should see fit to grant the writ of certiorari, the only purpose thereof would be to clarify the law, but such a procedure could not affect the out-

come of the case and would be merely dictum.

Respondent also denies that the trial court adjudicated the petitioner to be a fit parent (see decision of trial judge in appendix).

STATUTE INVOLVED

Respondent admits that if there is a federal constitutional question involved it would arise as a result of the due process clause of the Fourteenth Amendment. Respondent contends that the equal protection of law clause and the Ninth Amendment have nothing to do with the problem.

ARGUMENT

1. This case is not properly before this court because Supreme Court Rule 21g has not been followed by the petitioner.

This rule sets out that in review of judgment of a state court the statement of the case should specify the stage in the proceedings "both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised----."

From what information we have the federal question was not raised in the lower Connecticut Court. Apparently the constitutional questions were just raised in the Supreme Court of Connecticut.

The statement of the case does not show when the federal question was raised, nor does it show how it was raised. Therefore, this court does not have jurisdiction over the case.

2. The facts presented by the respondent are the correct facts.

The petitioner did not see fit to present the court with the transcript of the hearing in the lower Connecticut Court. Therefore the facts must be taken as those found by the trial judge.

Petitioner states (petition page 3) that he had "a strong and loving relationship with his daughter." The finding of the trial judge indicates that this is not so (see appendix 8).

Petitioner was behind in his support payments. This does not indicate a "strong and loving relationship" (see appendix pages 2-9).

Petitioner states as a fact that he was adjudicated "fit by the trial court" (petition, page 3). This is not true and is not supported by anything in the record. The trial

court held that he was not a "responsible, reliable caretaker". (appendix page 7) True the trial judge did not use the words "not a fit father," but certainly this is what he meant. No exact words are necessary.

3. No constitutional standards have been promulgated by this court to state the degree of proof necessary to give custody to a grandmother as against a father of a child.

This court has held many times that parents have rights in their children which must be recognized.

Stanley vs. Illinois 405 US 645, 92 S Ct 120B, 31 L Ed 21d 551 (1972)

Armstrong vs. Manzo 380 US 545, 85 S Ct 1187, 14 L Ed 2d 62 (1965)

Smith vs. Organization of Foster Families 431 US 816, 97 S Ct 2094, 53 L Ed 2d 14 (1977)

The cases setting out this theory of law can be divided into different groups.

1. Where the action is to terminate parental rights.

2. Where the state is a party.

3. Where custody alone is involved.

As to the first group this court has required proof that the government or person alleging that parental rights should be terminated has the burden of proof, not only by a preponderance of the evidence, but by clear and convincing proof. The court went on to say that the best interest of the child was paramount, but the proof had to be stronger than a mere preponderance of the evidence. The court

did not require proof beyond a reasonable doubt. The court held that the correct standard was by clear and convincing proof. This decision was decided by a 5 to 4 margin with a strong dissent by Justice Rehnquist.

Santosky vs. Kramer 455 US 745, 102 S Ct 1388, 71 L Ed 599 (1982)

The same case discussed at length the advantage which the state had in being able to produce witnesses, especially if the parent was not endowed with riches. This part of the case distinquishes between cases where the state is one party. Based on the reasoning in this case there is always a stronger reason for having a higher standard of proof of the unfitness of the parent in either the first or second of the two groups.

The final group of cases is where only custody is to be awarded,

and where the contest is between two natural person. Termination of parental rights is determined only once, and cannot be re-examined at a later time as can a custody determination. Certainly of the three groups, the third would require a lesser degree of proof than either of the other two.

> Hutchinson vs. Hutchinson, 649 P 2d 38 (Utah 1982)

However, courts all over the country have stated over and over that the welfare of the child is the primary factor.

> Spaulding vs. Palmer 81 Wash. 2d 604, 503 P.2d 464 (1977)
>
> Lane vs. Lane 466 A 2d 418 (Me. 1982)
>
> "It has been recognized moreover, that even though a parent is fit to have custody, he may be denied custody if this is clearly inimical to the best interests of the child."

24 Am. Jur 2d 968 (1982)

4. The Proper Rule is that there is a Presumption that the parent is entitled to custody, but this presumption is rebuttable when it is for the best interest of the child to do so.

It appears at first blush there may be conflict between the cases and authority above and the recent cases which hold that there is a presumption in favor of a parent in awarding custody as a matter of constitutional right. Examples include:

Stanley vs. Ilinois, supra

Armstrong vs. Manzo, supra

Popp vs. Lucas 182 Conn. 545, 438 A 2d 755 (1980

However, petitioner contends that these cases fit together. Normally the child is better off with one or both of its parents unless

there are some circumstances which show that considering all factors, the child is better off to be in the custody of some other person.

> "As a natural parent the plaintiff is entitled to custody unless it is established that the child's welfare plainly requires otherwise."
>
> Popp vs. Lucas, supra 438 A 2d @ page 758

The old rule that the welfare of the child is paramount still holds good, but we must recognize the rights of the parent to have custody, and with these facts in mind, determine what is the best interest of the child. Considering the right of the parent to have custody, and the evidence presented at the trial together, the trial court was thoroughly justified in finding that it was for the best interest of the

child to have custody awarded to the respondent.

Note that Popp vs. Lucas, supra, was decided by the Supreme Court of Connecticut in 1980, and was cited by that court in the decision in this case on page 406. Obviously the Connecitcut Court had the ruling in Popp in mind in deciding this case.

Respondent suggested that the court pay special notice to the standards set out in Spaulding vs. Palmer, supra, 503 P.2d @ page 466, as to what factors the court should consider in rendering a custody decision, and particularly the fifth standard which recommends broad discretion be given to the trial court who saw and heard the witnesses, rather than only the printed

record. (Here we do not even have the printed record.)

Petitioner relies on Hutchinson vs. Hutchinson , supra as authority that the decision of the Supreme Court of Connecticut is at odds with the Utah decision. Actually the Utah court sent the case back on the grounds that the trial judge had not made a specific finding of fact and law according to the Utah Rules of Court. In the case at bar the lower court made a lengthy memorandum of the facts and the law on which he relied. The Utah court set out standards which the trial should use in determining custody, but these standards are the ordinary standards that every law student learns in a domestic relations course. Nowhere in the decision does the Utah court mention the United States

Constitution or the Utah Constitution. Furthermore, everything the court said on this issue was dictum because it was decided on the basis of the rule.

5. Regardless of any standards the court might see fit to adopt, the facts of this case are strong enough in favor of the respondent, so that the result could not be changed.

This court should deny the writ. If another case arises were it is necessary to determine standards to see if the constitutional rights of the father were violated, they should then be determined, but not in this case in which the determination of standards would not affect the result.

Santosky vs. Kramer, supra, does establish standards of proof (clear and convincing evidence) necessary to

deprive a parent of his constitutional right to an interest in the child in a suit brought by the state where parental rights were to be terminated. Surely this court would never set a higher standard of proof in a case between a father and a grandmother where only custody is in question.

If the court does not see fit to set standards, the decision of the trial judge certainly should be upheld (Spaulding vs. Palmer, supra). If the court thinks that standards should be set, than the standards should be less rigid than those established in Santosky vs. Kramer, supra. But even using the Santosky standards, the case should not be overturned. The evidence is strong, clear and convincing that the child would not be well cared for by the

father. The following facts show this:

1. The new wife of the petitioner does not want to take care of the child.

2. The petitioner is behind in his support payments without explanation.

3. Visitation rights were not regularly exercised, but were only exercised on a fairly regular basis.

4. On two occasions when the child visited the petitioner, the child was sick, and proper medical care was not provided, and the child had to be hospitalized once for one week and once for two weeks on return to the mother. The petitioner was informed by a doctor that the child needed medical attention, but the petitioner did nothing about it.

5. The child was abused by the father and had fingermarks on her arms. The explanation of this episode given by the petitioner and his wife do not coincide and indicate that both explanations were fabricated.

6. The child herself has indicated a strong dislike to visit the petitioner.

7. The child herself has indicated a strong desire to live with her grandmother.

8. The child has lived with the grandmother almost all of her life, and has been substantially cared for by the grandmother for all of her life.

Surely no one could reasonably say that the proof that the child should stay with the grandmother is not clear and convincing. Again

respondent re-iterates that the decision of the trial judge should not be overturned unless there was no convincing proof that his decision was correct. Here all of the evidence supports his finding.

Assuming that the above reasoning is correct if the writ is granted, the final decision would not be changed. Respondent would be put to expense, worry and trouble for no avail to anyone.

CONCLUSION

The writ of certiorai should not be granted for the following reasons:

1. Case should be dismissed because Rule 21g has not been lived up to.

2. There are no cases in this court which set out standards of

proof between persons on custody matters.

3. There is no reason to establish such standards and each case should be handled on its own merits.

4. The constitutional right of a parent to company etc. of his child is subject to the welfare of the child, which is paramount in custody cases.

5. If the court decides that standards are necessary in a case such as this, such standards should not be established in this case because the result of the case would not be changed.

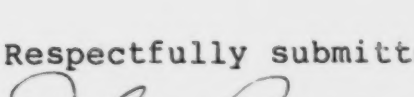
6. If such standards were established they would probably be less strict than in the Santosky case, and in any event the respon-

dent has lived up to whatever standards of proof would be required.

Therefore the writ should not be granted.

DATED: February 19, 1985

Respectfully submitted,



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